was entered, it gave them an opportunity to reargue the sole issue—where the action should be tried.

(2) The failure to follow *Kline* v. *Burke.*

The failure to follow *Kline* v. *Burke Construction Co.,* 260 U. S. 226 (1922), was not a departure from accepted practice because the *Kline* decision has no applicability to the facts of this case. It is clear in just the quoted portion of *Kline* (See Petition, herein, pp. 7-8), that the decision applies only to conflicts between the state and federal jurisdictions. *Kline* has no applicability to questions of priority between federal courts. It has been so held. See *Crosley Corporation* v. *Hazeltine Corporation,* 122 F. 2d 925 (3d Cir. 1941), c.d. 315 U. S. 813 (1941), reh. den. 315 U. S. 831 (1942); *Small* v. *Wageman,* 291 F. 2d 734 (1st Cir. 1961).

The rule that is applicable to the facts in this case is set forth in *Kerotest Mfg. Co.* v. *C-O Two Fire Equipment Co.,* 342 U. S. 180 (1952). In *Kerotest,* this Court held that the basic consideration is which jurisdiction can best serve the ends of justice by an expeditious and effective adjudication. *Kerotest* also establishes that the decision is one invoking the discretion of the trial court. Here, the trial court duly exercised its discretion. There is not even an allegation in the Petition that there was an abuse of discretion. The exercise of discretion was affirmed *per curiam* by the Court of Appeals. There was no error.

(3) The permitting "finally and reluctantly, two and a half months later", of "what amount [sic] to a pro forma argument of the cross-motion which it, of course, denied from the bench without opinion".

The implication is that the District Court acted in an improper manner. This is not the fact. There is not a bit of

evidence that any argument before the Court was "pro forma". In fact, the Court heard (albeit, for the second time) all of plaintiffs' arguments and considered plaintiffs' motion papers, affidavits and memorandum of law (App. 33a). The fact that the Court's decision was rendered from the bench and was not accompanied by a written opinion does not evidence a departure from accepted judicial procedure, nor does it evidence any prejudice to plaintiffs.

(4) The disregard of Rule 41(2).

There is nothing in the record, nor anything alleged by plaintiffs from which it could be inferred that the trial Court disregarded Rule 41 (a)(2). On the contrary, the Court acted in accordance with the Rule and determined in its discretion that a voluntary dismissal was not in order in this case. This determination was affirmed as a valid exercise of discretion by the Court of Appeals. Rule 41(a)(2) requires no more.

(5) The disregard of *Cone* v. *West Virginia Paper Co.*

There is no evidence that the District Court disregarded this Court's decision in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947). Plaintiffs' quotation from *Cone* plainly indicates that the Court was at that point discussing the traditional (pre-Rule 41(a)(2)) understanding with respect to voluntary dismissals. The *Cone* decision stands as clear authority that the traditional view was changed with the adoption of Rule 41(a)(2) and that thereafter there was no right to a voluntary dismissal. This is the import of *Cone* as it has been interpreted by virtually every federal court in the land.

POINT II

The decision of the Court of Appeals is not in conflict with the decision of any other Court of Appeals.

As previously discussed, the decisions below did not conflict in any manner with this Court's decision in *Kline* v. *Burke, supra.* The decisions in *Mach-Tronics, Inc.* v. *Zirpoli,* 316 F. 2d 820 (9th Cir. 1963) and *Telechron, Inc.* v. *Parissi,* 197 F. 2d 757 (2d Cir. 1952) are based on the *Kline* rule. Since they, like *Kline,* involve conflicts between state and federal courts, they, too, are inapplicable here. Citation of Professor Moore's treatise is also misplaced. He says specificially that it is where there is concurrent jurisdiction between a *state* and *federal* court that an action may proceed concurrently. See IA *Moore's Federal Practice,* 2d ed., p. 2605.

Plaintiffs state that the decisions below are in conflict with *Home Owners' Loan Corp.* v. *Huffman,* 134 F. 2d 314 (8th Cir. 1943) and *Ex Parte Skinner & Eddy Corp.,* 265 U. S. 86 (1924). The argument is an extension of the argument that there are conflicts with the decision in *Cone* v. *West Virginia Pulp & Paper Co., supra.* In *Ex Parte Skinner, supra,* this Court merely applied the traditional pre-Rule 41(a)(2) doctrine. As heretofore stated, the *Cone* case recognized the change embodied in Rule 41(a)(2). In the *Huffman* case, *supra,* the Court said,

> "Under Rule 41 a plaintiff does not have an absolute right to dismiss . . . without prejudice after an answer has been served." 134 F. 2d at 318.

Professor Moore does not support plaintiffs' view of the law. Plaintiffs cite page 1053 of Volume 5 of Professor Moore's treatise in support of their argument. There is nothing on page 1053 to support plaintiffs. However, on page 1055, Professor Moore writes:

> "The granting of the motion is within the court's discretion, and not a matter of right." 5 *Moore's Federal Practice*, 2d ed., p. 1055.

The District Court exercised its discretion and the Court of Appeals affirmed the exercise of discretion. That decision was not in conflict with any recognized authority.

POINT III

There is nothing before this Court which would call for an exercise of this Court's supervision.

Plaintiffs argue that they were not afforded a full and fair hearing by the District Court and state that there is an "implied admission" in the decision of the Court of Appeals "that a fair hearing of all of the 'vital' facts was not had" before the entry of the order enjoining further proceedings in the action pending in the Eastern District of New York. The "implied admission" apparently is contained in the following paragraph of the Court's opinion:

> "In this instance, where they are not only ancillulary to the interlocutory injunction but actually a vital affirmative part of plaintiffs' total effort to have their case tried in the Eastern District of New York, they are so reviewable because of the interlocutory injunction. National Equipment Rental, Ltd., v. Fowler, 287 F. 2d 43, 45 (2 Cir. 1961)."

The Court was there discussing the appealability of the interlocutory order denying the cross-motion. It is absurd to think that the Court intended to imply that plaintiffs were denied a full and fair hearing before the District Court. That the plaintiffs were afforded a hearing on the injunction motion is undisputed and is a matter of record (App.

12a). No facts other than those before the Court at that time were ever presented by plaintiffs and they do not here specify any "vital fact" they were prevented from placing before the Court. While the cross-motion may have been a vital part of plaintiffs' efforts to have this case tried in New York instead of in Newark, New Jersey, it is undisputable that every fact which plaintiffs relied upon to support their efforts was before the District Court both at the time it decided to issue the injunction and at the time it denied the cross-motion for transfer or voluntary dismissal. Plaintiffs received a full and fair hearing—twice. The Court of Appeals (with all of the facts before it) affirmed. There is no call for the exercise of this Court's supervision in this case.

CONCLUSION

After full and fair hearings, the District Court exercised its discretion in granting an Order enjoining an identical but later-filed action in another District Court, and denying a cross-motion to transfer or dismiss. The affirmance by the Court of Appeals did not sanction any departure from the accepted and usual course of judicial proceedings nor did its decision conflict with a decision of this Court or any other Court.

Respectfully submitted,

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